


MEMO

July 25, 2005

To: PRD File

From: Donna Darm, Assistant Regional Administrator, PRD 

cc: Kirsten Erickson, NOAA General Counsel, NW

Subject: Analysis of the Benefits of Designating versus the Benefits of Excluding Indian Lands from Critical Habitat for West Coast Salmon and Steelhead

This analysis was prepared to inform the agency's exercise of discretion under Section 4(b)(2) of the Endangered Species Act (ESA), which allows the Secretary to exclude any particular area from critical habitat designation if the benefits of exclusion outweigh the benefits of designation, so long as exclusion will not result in extinction of the listed species. The analysis first examines the benefits of designating Indian lands for each affected salmon and steelhead evolutionarily significant unit (ESU). It then examines the benefits of excluding Indian lands, and concludes that the benefits of exclusion outweigh the benefits of designation because: 1) excluding Indian lands has offsetting conservation benefits for all of the listed ESUs and 2) excluding Indian lands benefits the federal government's policy of promoting respect for tribal sovereignty and self-governance. Based on this conclusion, we recommend the agency exercise its discretion under ESA section 4(b)(2) to exclude Indian lands from designation, if further analysis supports a determination that the exclusions will not result in extinction of the species, taking into account the conservation needs of the species and information regarding potential exclusions of military areas. To aid the reader, the following Table of Contents outlines the organization of this memo:

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Background

The Northwest Region is recommending critical habitat designations for 12 salmon and steelhead ESUs in the Pacific Northwest. There are 25 Indian tribes whose lands intersect with defined critical habitat of the 12 ESUs. Table 1 shows the tribes and the ESUs involved.

Table 1. Tribes with lands intersecting critical habitat areas for each ESU

1. Puget Sound Chinook Salmon	Jamestown S'Klallam, Lower Elwha-Klallam, Lummi, Muckleshoot, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Skokomish, Squaxin Island, Swinomish, Tulalip, Upper Skagit
2. Hood Canal Summer-run Chum Salmon	Jamestown S'Klallam, Skokomish
3. Ozette Lake Sockeye Salmon	Makah
4. Upper Columbia River Steelhead	Colville
5. Snake River Steelhead	Nez Perce
6. Middle Columbia River Steelhead	Umatilla, Warm Springs, Yakama
7. Upper Willamette River Steelhead	Grand Ronde

In addition, the attached maps show the location and size of the Indian lands in the context of the range of the listed ESUs.

Section 7(a)(2) of the ESA requires federal agencies to ensure that any actions they authorize, fund or carry out are not likely to result in the destruction or adverse modification of designated critical habitat. (Section 7(a)(2) also requires federal agencies to ensure such actions do not jeopardize the continued existence of the listed species. Section 3(5)(A) defines critical habitat, but areas meeting the definition are not automatically designated. Section 4(b)(2) establishes the process the agency is to use in designating critical habitat. It requires us to designate critical habitat for threatened and endangered species “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” This section grants the Secretary of Commerce discretion to exclude any area from critical habitat if he determines “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” The Secretary’s discretion is limited, as he may not exclude areas if it “will result in the extinction of the species.”

Procedural Background

On February 16, 2000 we designated critical habitat for these ESUs (65 FR 7764). In that designation we excluded Indian lands based “on a consideration of the federal government’s trust responsibilities to Indian tribes, particularly as addressed” in the Secretarial Order, including our determination that designating such areas are not essential to the conservation of listed species, “and out of respect for tribal sovereignty over the management of Indian lands.” We also noted in the determination that the combination of all Indian lands made up only a

minor portion (less than three percent) of the total watershed area for the 13 Columbia basin ESUs. Therefore, we determined that the critical habitat that was designated was sufficient to provide for the conservation of the species.

Those designations were subsequently vacated by a court order. *National Association of Homebuilders v. Evans*, 2002 WL 1205743 No. 00-CV-2799 (D.D.C.). On December 14, 2004 we published a proposed critical habitat designation, proposing exclusion of Indian lands based on a determination that exclusion would benefit conservation of the listed species by enhancing tribal participation in regional management forums and would benefit federal policies that promote respect for tribal sovereignty and self-governance. As required by the Secretarial Order – *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, we met and consulted with tribes (tribal governments, staff, and intertribal organizations) both before and after issuing the proposed designations, to discuss possible impacts of designating critical habitat on Indian Lands. The tribes uniformly expressed opposition to the designation of critical habitat on their lands, both in meetings and in letters. Their view is that designation of critical habitat on their land will interfere with their sovereignty and their ability to govern their lands, and will hamper their ability to participate fully in the many regional processes established to manage and conserve salmon and steelhead across the landscape.

Unique Federal Relationship with Indian Tribes

Executive Order 13175 reiterates the unique relationship between the federal and tribal governments: *The United States has a unique relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions*. The nature of the relationship has been discussed from the earliest court cases (see *Worcester v. Georgia*). In his seminal work, Felix Cohen¹ points out that, while treaties with Indian tribes “are accorded the same dignity as that given to treaties with foreign nations,” they differ in at least two important respects. “Through the application of special canons of construction, Indian treaties are construed in favor of the Indians. Further, the courts will not find that Indian treaties have been abrogated by later treaties or legislation unless there is a clear and specific showing in the later enactment that abrogation was intended” (Cohen, p. 63).

This description supports points that will be made later in this memo regarding the purpose of Indian lands as reserves for tribal governments. The reservations are both secure homelands for the tribes, as well as bases for their economic stability. The title to the land is held by the United States for the sole beneficial use of the tribes and their members. These are not federal lands reserved for public use, but rather “Indian lands” reserved for use by tribal governments (and individual tribal members). Discussion regarding the future status of Indian lands should be consistent with these purposes.

Unique Status of “Indian Country” and Indian Lands

Before addressing specific characteristics of Indian Land, it is helpful to look at the legal status of the areas within which they are found, i.e., “Indian Country.” Indian Country is defined in 18 U.S.C. § 1151:

¹ Felix S. Cohen’s *Handbook of Federal Indian Law*, 1982 Edition, Rennard Strickland, et al, editors. Michie Bobbs-Merrill (1982).

- (a) all lands within the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,*
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and*
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.*

As Cohen points out: “The Indian country statute is thus of general importance in defining the special territory where Indians are governed primarily by tribal and federal law rather than state law” (Cohen, p 28).

“Indian lands” are defined in the Secretarial Order as “any lands title to which is either 1) held in trust by the United States for the benefit of any Indian tribe or individual, or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.” Additionally, it is a stated principle of the Secretarial Order that Indian lands “are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public land or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decision, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.”

The above supports the conclusions of Sandi Zellmar’s discussion in “Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First”.²

Thus, the trust responsibility arises not only from the nature of the relationship between tribes and the United States, but also from the massive transfer of lands from Indian Nations to the federal government and the retention and protection of a critical—though diminished—land base, as reflected in treaties. Just as sovereignty is at the very core of the trust responsibility, the tribal land base, retained by the tribes through treaties, is a critical component of sovereignty for most tribes.

Executive Policy Guides Treatment of Indian Lands in Designating Critical Habitat

In addition to Executive Order 13175, we have Department of Commerce direction, via the Secretarial Order, stating that Indian lands shall not be designated, nor areas where the “tribal trust resources . . . or the exercise of tribal rights” will be impacted, unless such lands or areas are determined “essential to conserve a listed species.” In such cases we “shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by designating only other lands.” The Secretarial Order is consistent with the long-standing policies of the federal government regarding relationships with, and responsibilities to, Indian tribes.

² Zellmar, Sandi B., South Dakota Law Review [43 S.D.L. Rev. 381] (1998)

The Secretarial Order direction was developed in consultation with tribal governments, in recognition of their sovereign status and management authority. The Order's purpose, in part, is to help ensure the tribes do not bear a disproportionate conservation burden.

This direction recognized the unique status of Indian lands. In the words of the Secretarial Order, "Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws." They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws. (For a description of the federal government's relationship and responsibility regarding Indian lands and trust resources, see *United States v. Mitchell* (463 U.S. 206 (1983)).

The Relationship between the Federal and Tribal Governments is Unique and Longstanding

The federal government has long recognized the unique status of Indian tribes. The U.S. Constitution recognized tribal status via the "Indian commerce clause." Additionally, treaties are identified as being part of the "supreme law of the land."

In addition to Constitutional recognition, there have been a number of executive branch expressions of the relationships³ between the federal and tribal governments. Examples of executive direction include:

- **Presidential Memorandum of April 28, 1994**—directs executive departments and agencies to "assess the impact of federal government plans, projects, programs, and activities on tribal resources to assure that tribal government rights and concerns are considered during ... [their] development."
- **Executive Order 13175 – Consultation and Coordination With Indian Tribal Governments (November 6, 2000)**—directs departments and agencies to "encourage Indian tribes to develop their own policies to achieve program objectives;" "where possible, defer to Indian tribes to establish standards;" "in determining whether to establish federal standards, consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian tribes."
- **Department of Commerce—American Indian and Alaska Native Policy (March 30, 1995)**— includes the following "Policy Principles":
 - Recognition of, and commitment to, "a government-to-government relationship with ... Tribal governments." (First Principle)
 - Recognition that "the tribal right to self-government flows from the inherent sovereignty of tribes and nations and that Federally recognized tribes have a unique and direct relationship with the Federal government." (First Principle)

³ Rather than conduct an exhaustive historical review of executive (or judicial, for that matter) direction this memo discusses the most recent examples. For more detail on the history of federal-Indian relations see *Cohen* and *Getches*.

- Recognition trust responsibility and commitment to “consult and work with tribal governments prior to implementing any actions when developing legislation regulations, and/or policies that will affect tribal governments, their development efforts, and their land and resources” (Third Principle)
 - “Pledges to honor the Constitutional protections to Indian Commerce” by recognizing that tribes, as sovereign governments, “are responsible for the welfare and rights of their members and the right to regulate commerce within their reservation boundaries.” (Fourth Principle)
 - Confirmation that the Department “will consult and work with tribal governments before making decisions or implementing policy, rules or programs that may affect tribes to ensure tribal rights and concerns are addressed.” (Fifth Principle)
 - Recognition “that as a sovereign government” tribes are “responsible for the welfare and rights” of their membership and have “the right to regulate commerce within [their] boundaries.” (Fifth Principle)
 - Commitment to identify and take “appropriate steps to remove any impediments to working directly and effectively with tribal governments.” This includes applying the requirements of applicable executive orders (e.g., 13175 on intergovernmental partnerships (see above) and 12866 Regulatory Planning and Reviews) and legislative (e.g., Regulatory Flexibility Act) requirements “to design solutions and tailor Federal programs, when appropriate, to address specific or unique needs of tribal communities.” (Sixth Principle)
- **SECRETARIAL ORDER--*American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.*** The secretaries of commerce and of the interior jointly issued the Secretarial Order in June 1997. The stated purpose of the Order is the clarification of “the responsibilities of the component agencies, bureaus and offices” of the Department “when actions taken under authority of the [Endangered Species] Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources or the exercise of ... tribal rights.” The opening section continues by saying the Departments will strive “to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.”

Several sections of the Secretarial Order refer to, or specifically address critical habitat. The following is from Appendix Section 3(B):

- (2) *Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to... (ii) designate critical habitat.*
- (3) *Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services*

shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

- *(4) In keeping with the trust responsibility, [the Services] shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.*
- *(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment... provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: ... (ii) designate critical habitat.*

In summary, as articulated in the February 16, 2000 FRN (65 FR 7764-7787, February 16, 2000) designating critical habitat:

- *...there is a unique and distinctive relationship between the United States and Indian tribes (as defined by the U.S. Constitution, treaties, statutes, executive orders, judicial decisions, and agreements), which differentiate tribes from the other entities that have a relationship with, or are affected by, actions of the federal government.*
- *This relationship has given rise to a special federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.*
- *Pursuant to the treaties, statutes, judicial decisions, executive orders and other agreements that define the relationship between the United States and tribes, lands have been retained by Indian tribes or have been set aside for tribal use. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.*

Benefits of Designation

The principal benefit of designating critical habitat is that ESA section 7 requires every federal agency to ensure that any action it authorizes, funds or carries out is not likely to result in the destruction or adverse modification of the designated critical habitat. This complements the Section 7 provision that federal agencies ensure their actions are not likely to jeopardize the

continued existence of a listed species. Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area. This may focus and contribute to conservation efforts by clearly delineating areas that are important to species conservation.

In developing the critical habitat designation for these ESUs, we first established those areas that meet the definition of critical habitat. For reasons described more fully in [CHART Report], we identified critical habitat areas as the occupied stream reaches within a watershed, as designated by the U.S. Geological Survey. In Puget Sound, we also identified nearshore areas meeting the definition of critical habitat, delineated using a mapping standard developed by Washington State. We asked teams of federal biologists to determine the relative conservation value of each area for each species (high, medium or low). Their evaluation provided information allowing us to determine the benefit of designating any particular watershed in a way that would aid the 4(b)(2) balancing test. The higher the conservation value of an area, the greater the benefit of the section 7 protection.

Table 2 shows the habitat that would be affected by a designation on Indian lands. The benefits of designation depend upon the extent of the habitat under consideration, its conservation value, and the types of federal activities in that area likely to undergo section 7 consultation.

Table 2: Number of stream miles and nearshore miles of habitat intersecting with Indian lands.

ESU and Occupied Miles (Occupied stream miles / occupied nearshore miles)	Stream miles overlapping with Indian lands			Indian lands overlap as % of total stream miles occupied	Nearshore miles (all high) overlapping with Indian lands	Indian lands overlap as % of total nearshore miles occupied
	<i>Conservation Value</i> High Med Low					
1. Puget Sound Chinook Salmon (2,216 / 2,376)	46		<1	2%	146	6%
2. Hood Canal Summer- run Chum Salmon (88 / 402)		4		5%	9	2%
3. Ozette Lake Sockeye Salmon (44 / na)	<1			2%		
4. Upper Columbia River Steelhead (1,332 / na)	43	2	9	4%		
5. Snake River Steelhead (8,225 / na)	27	12		<1%		
6. Middle Columbia River Steelhead (6,529 / na)	535	63	1	9%		
7. Upper Willamette River Steelhead (1,830 / 0)	9		2	<1%		

The activities occurring in these areas that would be likely to undergo a section 7 consultation include several transportation projects, of permits for instream work, minor NPDES permits, and dredging. In the range of Puget Sound chinook there may be some federal activity associated with a non-hydropower dam and a major NPDES permit. In the range of mid-Columbia steelhead there may be some federal activity associated with hydropower dams. There are also likely to be a very few actions associated with mining, utilities and development. Table 3 shows an estimate of the federal activities likely to occur within the range of each ESU.

Table 3. Number and type of federal activities likely to occur on Indian lands within critical habitat of each ESU.

ESU	Mining	Utility	Dredging	Instream Activities	Development	National Pollutant Discharge Elimination System	Transportation	Non-Hydro Dams	Hydro Dams
1. Puget Sound Chinook Salmon			4	56	1	30	10	1	
2. Hood Canal Summer-run Chum Salmon				1					
3. Ozette Lake Sockeye Salmon									
4. Upper Columbia River Steelhead	1		1	15		1			
5. Snake River Steelhead				4			1		
6. Middle Columbia River Steelhead	1		1		1	5	10	1	2
7. Upper Willamette River Steelhead		1				1			

Benefits of Exclusion

Exclusion has Conservation Benefits that Offset the Benefits of Designation

Tribal governments are co-managers of salmon and steelhead resources throughout the region. The co-manager relationship crosses tribal, federal, and state boundaries, due to the migratory characteristics of the species. The Regional Administrator, in testimony before the U.S. Senate Indian Affairs Committee (June 2003), emphasized the importance of this co-manager relationship:

We have repeatedly stressed to the region's leaders, tribal and non-tribal, the importance of our co-management and trust relationship to the tribes. NOAA Fisheries enjoys a positive working relationship with our Pacific Northwest Tribal partners. We view that relationship as crucial to the region's future success in recovery of listed salmon.

Examples of that “positive working relationship” can be seen in federal-tribal participation within the *U.S. v. Oregon* and *U.S. v. Washington* framework and the participation of tribes on interstate (Pacific Fisheries Management Council) and international (Pacific Salmon Commission) management bodies. Additionally, there are innumerable local and regional forums and planning efforts in which the tribes are engaged with the federal government. These activities result in several benefits to the salmon species, by ensuring that habitat priorities are identified and addressed, that hatchery reforms are implemented, and that harvest does not preclude recovery. The participation of the tribes is crucial to the management and recovery of the listed species. Examples of tribal involvement in these arenas include:

- **Harvest.** The impacts of harvest can be significant. The challenge is to design harvest programs that reduce the impact on listed fish to acceptable levels while also providing meaningful opportunities for tribal harvest to target more abundant stocks. Examples of ways to meet this challenge include:
 - **Joint Resource Management Plans** (JRMP) are one of several categories of activities that can be exempted from the take prohibitions of Section 9 of the “limits.” These limits on the application of take prohibitions are prescribed in ESA 4(d) Rule (50 CFR Part 223). In effect, this rule provides means for allowing take of threatened species when such occurs in conformity with NOAA-approved resource management plans developed jointly by the states and tribes under the jurisdiction of *U.S. v. Oregon* or *U.S. v. Washington*. Examples include: Salmon Fisheries and Steelhead Net Fisheries Affecting Puget Sound Chinook Salmon in 2003-2004, and Puget Sound Comprehensive Chinook Management Plan: Harvest Management Component.
 - **Tribal Resource Management Plans** (TRMP) make up another category of activities covered by one of the limits included in the 4(d) rule noted above. TRMPs are developed by the tribe(s) to meet their management responsibilities and needs in a manner consistent with the purposes of the ESA. Examples include: Tribal Chinook Research in Puget Sound, Washington; Tribal Resource Management Plan for Threatened Snake River Spring/Summer Chinook on the Imnaha River Subbasin in 2002-2004, prepared by the Nez Perce Tribe; and Tribal Resource Management Plan for Snake River Spring/Summer Chinook in the Grand Ronde River in northeast Oregon prepared by the Umatilla Tribe in 2004.
 - **Pacific Fishery Management Council** (PFMC) is a process that sets annual fisheries in federal waters from three to 200 miles off the coasts of Washington, Oregon, and California.
 - **Pacific Salmon Commission** (PSC) was established by treaty between Canada and the United States “for the conservation, rational management, and optimum production of Pacific Salmon.” The PSC is an eight-person body made up of four Commissioners each from the United States and Canada. Each Commissioner has an alternate. Of the four U.S. Commissioners, one represents Alaska; one represents the states of Washington and Oregon; one represents the treaty tribes in Washington, Oregon, and Idaho; and one

represents the federal government. The Alternate Commissioners are used effectively to broaden the body's regional representation of the Commissioners. For example, the tribes' Commissioner and alternate Commissioner are involved in the *U.S. v. Washington* and *U.S. v. Oregon* cases, respectively, ensuring that both cases are knowledgeably represented in Commission deliberations and that the interests of commercial and recreational fisheries as well as federal, state, and tribal governments are also represented. The United States and Canada each have one vote within the Commission, so there must be consensus for bilateral decisions to be made. Within the U.S. Section, the voting rules, which are prescribed in the implementing legislation, give the tribal Commissioner one of the three U.S. votes (the federal Commissioner has no vote.) Tribal representation is also included on the Southern and Fraser River Panels, which focus on particular fisheries and make recommendations to the Commission.

The voting mechanisms and representational structure embodied in the U.S. Section of the PSC institutionalize tribal co-management authority and ensure the tribes a "seat at the table" for all matters relating to implementation of the Pacific Salmon Treaty.

Several technical committees provide technical management advice to the Commission and panels; state, federal and tribal biologists have been appointed to and serve on the Committees.

A great number of fishing regimes and fishery management plans have been developed within the PSC forum, all with tribal involvement. As examples:

- The Fraser River Panel manages the Fraser sockeye and pink fisheries in northern Puget Sound and southern British Columbia every summer. The U.S. Section of the Fraser River Panel includes a tribal Panel Member (and an alternate), whose concurring vote is required before the Panel can make a decision.
 - A comprehensive coho management regime was negotiated and agreed to within the PSC process in 2002. Tribal and NOAA Fisheries, as well as Washington and Oregon representatives, were involved throughout the negotiation of this plan.
 - Chinook fisheries from Alaska to Oregon are managed pursuant to a comprehensive plan ("chinook annex") embodied in the Pacific Salmon Treaty. This plan was negotiated with tribal involvement, and among its intents were limiting the impact of fisheries on weak chinook stocks and returning a share of the impacts to terminal areas, thereby addressing "north-south" allocation of chinook salmon (i.e., sharing between Alaska and the "southern" states and the treaty tribes of far-north migrating chinook stocks).
- **U.S. v. Washington** resulted in the federal court requiring the co-management by federal agencies, states, and tribes concerning fisheries in Puget Sound. The *Puget Sound Salmon Management Plan* is a joint co-management plan to manage the harvest and other activities associated with Puget Sound salmon.

- **U.S. v. Oregon** resulted in the federal court overseeing the co-management by federal agencies, states, and tribes of fisheries in the Columbia River and its tributaries. The *Columbia River Fisheries Management Plan* is a joint co-management plan to manage the harvest and other activities associated with Columbia River salmon.
- **In-season management** involves cooperation among federal, tribal, and state biologists in analyzing the size of fish runs as salmon and steelhead migrate back to their rivers and hatcheries of origin.
- ***Hatcheries.*** The impacts of hatchery programs can be significant. The challenge is to identify where (spatially and temporally) to place the artificial propagation efforts to meet both harvest and recovery needs. Examples of federal-tribal cooperation in meeting the challenge include:
 - **Hatchery Genetic Management Plans** (HGMP) are a mechanism for addressing the take of certain listed species that may occur as a result of artificial propagation activities. They are developed by federal agencies, states, and tribes concerned with the management of hatchery programs that will lead to fish recovery. NOAA Fisheries reviews HGMPs for consistency with the ESA.
 - **Makah Tribe** and NOAA Fisheries agreed on a long-term management plan involving the artificial propagation of threatened Ozette Lake Sockeye Salmon in 2003.
- ***Hydropower.*** The Federal Columbia River Power System (FCRPS) has acknowledged adverse impacts on listed salmonids. It is critical to include tribal co-managers in the decision-making process.
 - **Federal Columbia River Power System Implementation Team** is made up of program- and policy-level representatives from federal operating and regulatory agencies, states, Columbia River Indian Tribes, and Mid-Columbia Public Utility Districts. The purpose of the Implementation Team and its technical teams (System Configuration Team; Water Quality Team; Transboundary Gas Group; and Technical Management Team) is to provide a mechanism for coordination, decision-making, and appropriate and timely implementation of NOAA Fisheries' FCRPS BiOp.
- ***Habitat.*** Habitat restoration is recognized as critical to the recovery of salmonids. Research is needed to identify the appropriate habitat on which to focus, as well as to restore it in the most efficient manner. Examples of activities involving tribes as co-managers in addressing habitat concerns include:
 - **Salmon and Steelhead Habitat Inventory and Assessment Project**, a computerized information system developed by the Washington Department of Fish and Wildlife, the tribes, and others to catalogue details about habitat and to map fish stock distribution and status.

- **Pacific Coastal Salmon Recovery Fund** was established in FY 2000 to provide grants to the states and tribes to assist state, tribal, and local salmon conservation and recovery efforts. Congress specifically appropriated funds for Columbia Basin and coastal tribes, in recognition of the critical role they play in salmonid management and eventual recovery.
- NOAA Fisheries has stated that the subbasin plans will be used as the foundation for its recovery planning tasks. To that end, NOAA Fisheries has provided interim targets for listed salmon populations to subbasin planning groups and has stated that its intention to adopt subbasin plans as local recovery plans.
- ***Recovery Planning.*** NOAA Fisheries is responsible for the development of Recovery Plans for listed species. With species that encompass such vast geographic areas, it is essential to involve co-managers. The tribes are integral to the successful development of recovery plans. Examples include:
 - **Shared Salmon Strategy for Puget Sound**, a cooperative effort that links ongoing wild salmon recovery initiatives at the tribal, state, federal, and local levels to create a plan that is viable and cost-effective. It establishes, organizes, and manages these links; identifies necessary long- and short-term actions, and coordinates funding needs; and proposes laws or policies needed to support wild salmon recovery.
 - **Technical Recovery Teams** are responsible for establishing biology-based ESA recovery goals for listed species. The TRTs serve as science advisors to recovery planners.

Exclusion Furthers Federal Policies Promoting Tribal Sovereignty and Self-Governance

In the current designation effort, we have contacted all potentially affected tribes by letters to the Tribal Chairs (with copies to the identified key tribal staff) and electronic mail to key tribal staff. Additionally, a number of meetings and workshops were held with tribes and intertribal organizations. We have also received numerous letters from tribes in response to our previous communications, comments to the Advance Notice of Proposed Rulemaking (68 FR 35926, September 29, 2003), and comments on the proposed designation (69 FR 74572, December 14, 2004). In all of these communications and conversations, the tribes unanimously expressed their objections to Indian lands being designated as critical habitat.

- ***Interference with tribal sovereignty, including tribal reserved rights to manage their own lands and resources.*** One of the essential features of tribal sovereignty is the jurisdictional control the tribal government is able to exercise over its (and its members) land. Numerous judicial opinions have stated that these essential government features include the ability to levy taxes and develop/enforce zoning requirements on its membership. In 2000, we recognized the inherent right of the tribe to manage the land set aside for the specific uses of the tribes and their members.

EO 13175 states, in part, that “when formulating and implementing policies that have tribal implications,” we will, “to the extent permitted by law... defer to Indian tribes to establish

standards, and... consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian tribes.”

- ***Economic impacts to both growth and stability.*** Tribes face the unique circumstance of being restricted to specific and limited geographic locations. Such restrictions have the result of limiting the economic opportunities open to the tribal governments. Further exacerbating the limitations inherent to the somewhat fixed land status (spatially) is the fact that the potential effect of designating critical habitat could further negatively impact the relatively limited economic development opportunities for tribes. Additionally, the economic options, such as transfers or mobility of land ownership, are extremely limited. Tribal members, like their tribal government, are not in position to sell their land and move to some other less affected area.
- ***Violation of Trust Responsibility.*** An essential feature of Trust Responsibility is the management of tribal resources by federal agencies, tribes themselves under Indian Self-Determination or Tribal Self-Governance arrangements, or through federal-tribal co-management for the benefit of Indian tribes and/or Indian individuals. In the arena of salmonid management, the tribes and we are co-managers (with the states). The co-manager relationship includes all aspects of salmon and steelhead management: hatchery development, production, and management; management of natural stocks; and harvest management. In all of these aspects of the conservation and management of the species, including listed stocks, the fish managing partners (NOAA Fisheries, tribal governments and their fisheries programs, and states) work together cooperatively to ensure the conservation and recovery of fish as both ESA-listed species but also as trust resources. To designate critical habitat on Indian lands would be viewed as a negative impact to that relationship and would place future cooperation in jeopardy.
- ***Contrary to Secretarial Order requirements.*** The Secretarial Order contains both general and specific guidance regarding the potential designation of critical habitat on Indian lands. The general guidance reinforces the “consultation principles” of the federal government, i.e., whenever the federal government is embarking on a course of action that has the potential to affect tribes, the action agency should consult with the affected tribal government. Specific guidance includes:
 - Evaluating critical habitat proposals with implications for tribal trust resources or the exercise of tribal rights.
 - Soliciting information from potentially affected tribes on the various impacts that may result from the designation.
 - Preparing economic analyses with impact tribal communities.
 - Preparing balancing tests to determine appropriate exclusions from critical habitat and in review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.
 - Before designating Indian lands where “the exercise of tribal trust resources... or the exercise of tribal rights” will be impacted, first determine if those Indian lands are “essential to the conservation [of the] species” and, when such is the case, we will

“evaluate and document the extent to which the conservation needs of the listed species can be achieved by” designating only other lands.

- *Harm to, or undermining of, the NOAA Fisheries–tribal co-manager relationship regarding listed salmon.* In addition to the above individual aspects of the federal-tribal government relationships, there are unique co-manager relationships between the governments regarding salmonids. This unique relationship is exhibited, in part, through a variety of work projects that address areas such as harvest, hatchery, habitat, and hydropower (see above).

If tribal lands are designated as critical habitat the practical consequence would be the diversion or re-direction of scarce staffing and financial resources. Tribal governments have consistently stated that their staff and financial resources are extremely limited. A requirement for additional consultations would likely result in diverting program resources from current management and conservation efforts.

Balancing Benefits of Exclusion against Benefits of Designation

Designation of the Indian lands under consideration would require federal agencies to ensure that any actions they carry out, fund or permit are not likely to adversely modify the areas designated. Depending on the ESU, the habitat ranges from X to XX stream miles and from X to XX nearshore miles. The activities likely to have federal involvement and therefore undergo consultation include permits for instream work and NPDES, transportation projects, dredging, utilities, mining and dams. For all but one ESU, the areas involved represent less than 5 percent of the total miles of habitat available.

Regarding the educational benefit of critical habitat designation, in numerous letters to NOAA Fisheries, the tribes have documented how they are already working with us to address the habitat needs of the species on these lands as well as in the larger ecosystem, and they are fully aware of the conservation value of their lands.

The major benefit to be derived from the exclusion of Indian lands is the positive, productive effect on our co-management and working relationship with the tribes. The federal and tribal governments have a long relationship. The tribes are active partners and co-managers in a wide variety of essential activities addressing harvest, hatcheries, hydropower, habitat and recovery planning. Encouraging and supporting the continued participation by the tribes in these efforts, including the many in which they take the lead, is vital to the recovery of the listed species. The region’s tribal governments have repeatedly stated they are constantly confronting the allocation of scarce resources (personnel and financial) to address salmonid management. These resources are already committed to participation in the numerous regional planning and management forums, as well as the development and implementation of specific plans and projects that address habitat restoration, harvest management, and production programs. Including tribal lands within critical habitat designation would force the reallocation of these scarce resources to address additional regulatory and consultation requirements. This would be viewed as an unnecessary competitive pressure on the tribal resources leading the tribal governments to be less inclined, or able, to participate in these current and ongoing protection and conservation efforts we view as crucial to the restoration and recovery of the species.

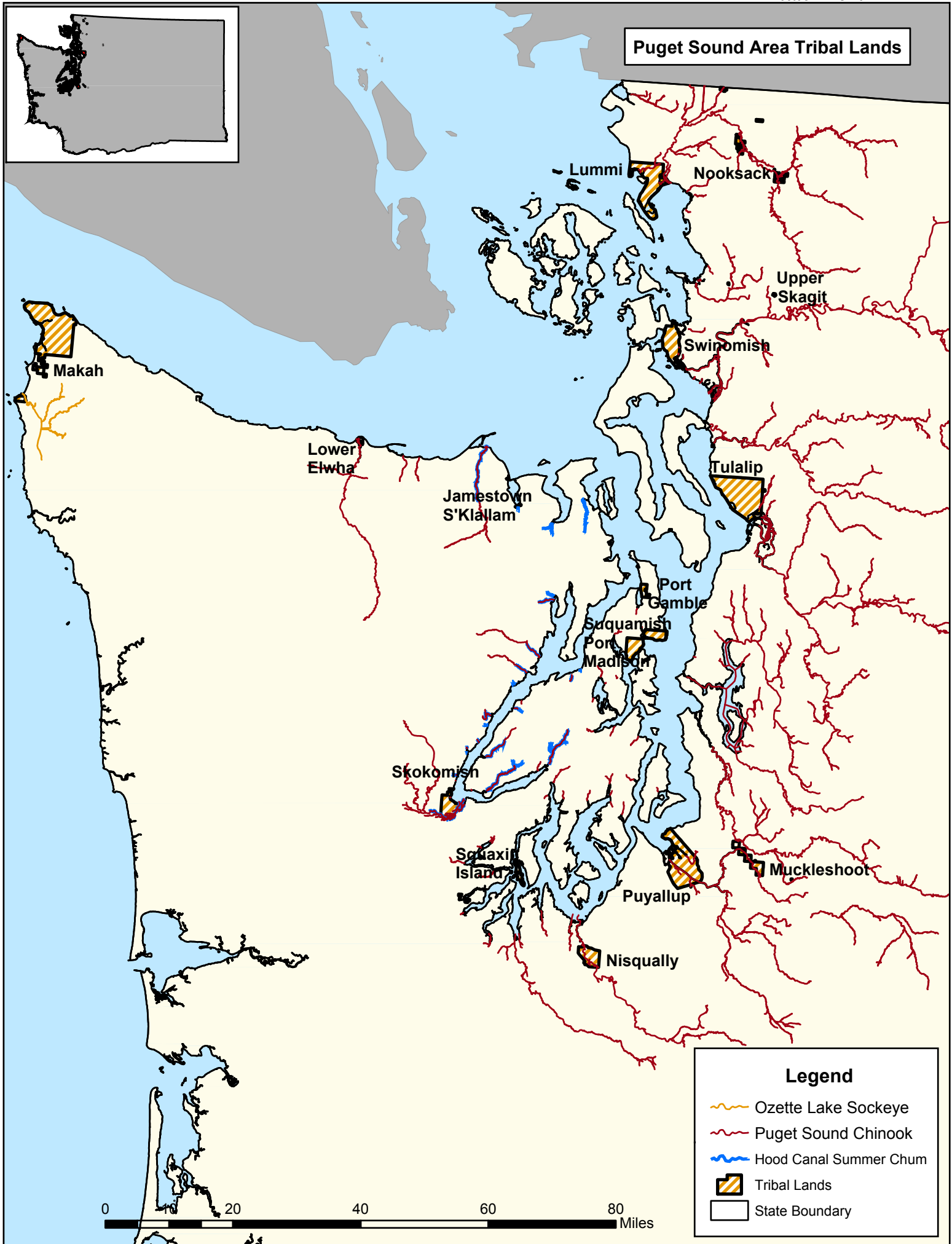
Exclusion of Indian lands would also further federal government policies to promote tribal sovereignty and self-governance:

- The Secretarial Order states that Indian lands will not be designated as critical habitat unless they are essential for conservation, i.e., after the Secretary determines that the designation of all other non-Indian land is insufficient to conserve the species.
- The exclusion is consistent with the April 28, 1994 executive memorandum and executive order 13175.
- The exclusion is consistent with past Federal Register-published secretarial determinations (65 FR 7764-7787, February 16, 2000).
- The exclusion is consistent with the recognition of the sovereignty of tribal governments and their jurisdiction over Indian and (where documented) non-Indian lands.
- The exclusion is consistent with departmental/agency trust responsibility in that it supports an essential purpose of the Indian lands, including economic security; it recognizes tribal primacy regarding the management of tribal lands; and it complies with direction/statements found in the Secretarial Order and EO 13175.
- The exclusion supports and affirms the federal-tribal co-manager partnership crucial to the conservation and recovery of the species.

Based on the foregoing analysis, I conclude that the benefits of excluding the identified Indian lands outweigh the benefits of designating those lands because: 1) excluding Indian lands has offsetting conservation benefits for all of the listed ESUs and 2) excluding Indian lands benefits the federal government's policy of promoting respect for tribal sovereignty and self-governance. This conclusion is consistent with relevant judicial decisions on what to consider in determining critical habitat. *Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090, 1005 (2003), found that "[i]t is certainly reasonable to consider a positive working relationship relevant, particularly when that relationship results in the implementation of beneficial natural resource programs, including species preservation." *Douglas County v. Babbitt*, 48 F.3d 1495 (1995), found that the impacts relevant for consideration are those which further the purposes of the ESA.

Further analysis is necessary to determine whether excluding these lands will result in extinction of any of the ESUs, after taking into consideration the conservation needs of the ESUs and any other potential exclusions being considered for military areas.

Map Attachments (3)



**Middle Columbia and
Snake River Basin Tribal Lands**